BEFORE THE INDIAN CLAIMS COMMISSION

GILA RIVER PIMA-MARICOPA INDIAN COMMUNITY, et al.,	)	
Plaintiffs'	)	Docket No.
v.	)	228
THE UNITED STATES OF AMERICA,	)	
Defendant.	)	

Decided: January 20, 1972

Appearances:

Z. Simpson, Cox, Attorney
for Plaintiffs

David M. Marshall,
for Defendant

OPINION OF THE COMMISSION

Yarborough, Commissioner, delivered the opinion of the Commission.

Here at issue is the determination of the date of extinguishment of plaintiffs' aboriginal title to lands described in Finding 23 of Gila River Pima-Maricopa Indian Community v. United States, Docket 228, 24 Ind. Cl. Comm. 301, 335 (1970). Additional findings of fact are made herein as relevant to this issue.

The plaintiffs have moved that the

Commission enter its order determining the dates of extinguishment to be the average date of patenting or, in the alternative, the average date of entry of settlers into the aboriginal title lands. The defendant submits that the date of taking should coincide with the date when Congress established the initial Pima reservation, February 28, 1859.

The United States retains the supreme power to extinguish aboriginal title in such manner deemed wise by Congress. United States v. Santa Fe Pacific Railroad Company, 314 U.S. 339, 347 (1941). Where, however, there is no positive single act of cession or extinguishment, all the circumstances must be considered to determine at what point there was an exercise by the Government of full sovereign rights to an extent inconsistent with a continuing claim of title in the original Indian owners. The proper approach is suggested in United States v. 12

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Santa Fe Pacific Railroad Co., supra, at 353-4.

> We search the public records in vain for any clear and plain indication that Congress in creating the Colorado River reservation was doing more than making an offer to the Indians, including the Walapais, which it was hoped would be accepted as a compromise of a troublesome question. We find no indication that Congress by creating that reservation intended to extinguish all of the rights which the Walapais had in their ancestral home. That Congress could have effected such an extinguishment is not doubted. But an extinguishment cannot be lightly implied in view of the avowed solicitude of the Federal Government for the welfare of its Indian wards . . . . (footnote omitted)

The defendant contends that the setting aside of an Indian reservation for occupancy by the Indians is an assertion of dominion that extinguishes aboriginal title, and cites Mohave Tribe v. United States, Dockets 295, et al., 7 Ind. Cl. Comm. 219, 242-244, 265 (1959); Northern Paiute Nation v. United States, Docket 87, 7 Ind. Cl. Comm.

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615 (1959); Shoshone Tribe v. United States, Dockets 326 and 367, 11 Ind. Cl. Comm. 387, 415, 445 (1962); and Mescalero Apache Tribe v. United States, Docket 22-B, 17 Ind. Cl. Comm. 100, 145, 160 (1966).

All of those cases involve non-treaty 13
extinguishments of Indian title in the area gained by the Mexican Cession of 1848. In each case the date of extinguishment was found to be the date of establishment of a reservation for the respective plaintiffs.

A common factor that is found in those cases is that the Indians were nomadic and were considered at least potentially hostile. Establishment of the reservations involved removal of at least portions of the tribes to the reservations, confinement to them, and relinquishment of the land use patterns of the prior way of life. It

cannot be said that establishment of the initial reservation is necessarily the key event that extinguishes aboriginal title, see United States v. Santa Fe Pacific Railroad Co., supra; Jicarilla Apache v. United States, Docket 22-A, 17 Ind. Cl. Comm. 338 (1966); Fort Sill Apache Tribe v. United States, Dockets 30-A and 48-A, 19 Ind. Cl. Comm. 212 (1968).

In this case, however, the Pimas were sedentary and notably friendly to the United States. The setting aside of a reservation for the Pima-Maricopa had its inception in their need for protection from probable incursions by white settlers. The findings of the title phase of the case at hand indicate a reservation was established in 1859 for the Pima-Maricopa on land which they then occupied. They did not agree to the reservation by treaty, and they did not

stay within the boundaries of the reservation because they had been accustomed to using more land.

The defendant has failed to prove that, by creating the 1859 reservation for the Pima-Maricopa, the Congress intended to deprive those Indians of their rights to other lands. The plaintiffs continued to use and assert their right to use other lands, and this was known to government agents. The record shows no unequivocal assertion by the Government that the plaintiffs' rights to other lands had been extinguished.

The defendant cites Alcea Band of Tillamooks v. United States, 103 Ct. Cl. 494, 560-562 (1945), aff'd 329 U.S. 40 (1946), for the proposition that surveying and sale of lands by the Federal Government shows a continuous

exercise of dominion by the United States, and that treating such lands as public domain is an extinguishment of aboriginal title.*

In an appropriate factual context, it may be that surveying lands, or surveying and disposing of lands, or proclaiming lands for sale, may be sufficient evidence of the governmental intent to extinguish title. See Cowlitz Tribe v. United States, Docket 218, 25 Ind. Cl. Comm. 442 (1971). Here, however, rather than a governmental intent to confine, there appears an intent to grant the Indians the land they seemed to occupy and need. The Gila River Reservation was expanded some six-fold between 1859 and 1883. The Salt River Reservation was established in 1879 for Pimas who had move

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*That case also had the added factor that most of the Indians had been removed from their aboriginal lands and confined to a reservation.

there. During this time span, the continued additions to the Pima reservation lands are not consistent with an intent to extinguish their aboriginal title. The fact that some lands in the Pima aboriginal tract were surveyed and patented does not compel a conclusion that the United States intended to extinguish all plaintiffs' Indian title, where only something much less than 10% of those lands was disposed of to settlers. (Of course, those dispositions extinguished aboriginal title to the particular small tracts involved.) 15

The intention of the Government to assert dominion over the subject land does become manifest at the enlargement by Executive order of the Gila River Reservation in 1883. The reservation was enlarged to its present size by six executive

orders subsequent to 1876. The greatest single addition was by the Executive Order of November 15, 1883 (1 Kappler 808), which enlarged it to almost its present 372,000 acres. There is an apparent attempt to make a final settlement of the Pima claims to land, and unequivocal exercise of dominion over the public domain thereafter. Therefore the Commission has found that the date of taking in this case should be November 15, 1883, for those lands which had not been entered by white settlers before that point in time.

For those lands which had been entered previous to 1883, the Commission urges the parties to determine an average entry date to avoid the burden of valuing each separate tract. See Pueblo de Zia v. United States, Docket 137, 19 Ind. Cl. Comm. 56 (1968).

(Signed)
Richard W. Yarborough,
Commissioner

We Concur:

(Signed)
Jerome K. Kuykendall, Chairman

(Signed)
John T. Vance, Commissioner

(Signed)
Margaret H. Pierce, Commissioner

(Signed)
Brantley Blue, Commissioner

October Term 1973 No.

GILA RIVER PIMA-MARICOPA
INDIAN COMMUNITY, et al.,

Petitioners,

v.

UNITED STATES,

Defendant.

AFFIDAVIT

I, STEPHEN L. COX, one of the attorneys for Gila River Pima-Maricopa Indian Community, appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 29th day of August, 1974, I served copies of the foregoing Petition for Writ of Certiorari to the United States Court of Claims on the Solicitor General, Department of Justice, by mailing three copies, air mail, postage prepaid, to The Solicitor General, Department of Justice, Washington, D. C. 20530.

COX AND COX

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SUBSCRIBED AND SWORN TO before me this 29th day of August, 1974.

My commission expires
July 5, 1975

Clara L. Smith

Notary Public